



IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

No.

THE CUDAHY PACKING COMPANY, A MAINE
CORPORATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR A WRIT OF
CERTIORARI.**

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for writ of certiorari.

Jurisdiction.

The basis of the jurisdiction of this Court is shown in the accompanying petition.

Opinions Below.

The initial opinion of the United States Circuit Court of Appeals is to be found at page 494 of the record and its opinion on petition for rehearing at page 525 of the record.

SPECIFICATION OF ERRORS.

Petitioner states that the United States Circuit Court of Appeals for the Seventh Circuit erred:

(a) In sustaining conclusion of law No. 1, reached by the trial court that the claim for refund does not comply with the statute and is insufficient to support the jurisdiction of the United States District Court in that it contains no evidence from which it can be determined whether or not the petitioner shifted the economic burden of the tax.

(b) In sustaining the trial court's conclusion of law No. 2 that the evidence is insufficient to establish that the petitioner bore the burden of the amount of the floor stock tax paid by it and that it has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly.

(c) In failing to hold on the fact findings as made and on the uncontradicted evidence as to which no fact findings were made that the plaintiff bore the burden of the amount of the floor stocks tax paid by it, and that it has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly.

(d) In the alternative, in failing to hold that it is inherently impossible to determine upon all the facts whether the burden of the tax was borne or shifted, and in failing to conclude as a matter of law that the petitioner in such event is entitled to recover.

ARGUMENT.

I.

The Circuit Court of Appeals Was in Error in Holding That the District Court Was Without Jurisdiction on the Authority of the Decision of This Court in *Angelus Milling Co. v. Commissioner*, 65 Sup. Ct. 1162.

It is conceded that the claim for refund in the case at bar was defective in that it failed to contain in Schedule D all of the evidence on which the claimant relied to show that the burden of the tax was not shifted. The claim did contain evidence that the burden of the tax was not shifted in the legal sense, although it contained no evidence as to the economic shifting of the burden thereof. The information called for by all schedules other than D was incorporated in the claim.

In a footnote in the decision of this Court in the *Angelus* case the Court observed, in reference to the original claim filed on behalf of Niagara Falls Milling Co. and Angelus Milling Co.:

“The only information furnished in these claims is the name and address of the joint claimants and a statement of the dates and amounts of the tax payments made by Niagara Milling Co.”

Again, in speaking of the amendment to that claim which was made by and on behalf of the Angelus Milling Co., this Court said:

“This claim was submitted on Form PT 79. It failed to give the information required by the form and regulations, containing merely an apportionment between Angelus and Niagara of the three earlier claims.”

Thus, there was a complete failure on the part of the plaintiff to furnish any evidence whatsoever in support of its claim. Nevertheless, the Court, without needless elaboration, concluded that "there is nothing in what Congress has explicitly commanded to bar the claim."

We assume that the reason for the Court's conclusion is that although the claim did not comply with the regulations, as Section 903 of the statute says it must, nevertheless, the Commissioner had the power to waive the defects because the requirements of Section 903 are merely procedural, although he is without power to dispense with the substantive condition to recovery set forth in Section 902.

In any event, on the facts in that case, the Court did hold that the Commissioner had the power to waive the defects in the claim there involved.

The question, therefore, is: what action by the Commissioner amounts to a waiver? In the *Angelus* case the Court holds that it must be clear that the Commissioner has seen fit to dispense with his formal requirements and to examine the merits of the claim. The Court also seems to hold that the Commissioner can investigate the merits and still deny the claim for form but that he cannot do so after he has investigated the merits and taken action upon the claim. Surely, the action which, coupled with the investigation, amounts to a waiver may fall short of rendition of a decision upon the merits because a decision on the merits was not the basis for the holding of waiver in any of the cases cited in the *Angelus* decision.

Although a ruling on the claim on the merits evidently is not necessary to constitute a waiver, it is not made clear what action it is that must be coupled with the investigation to evidence an intention to waive. Whatever the shading may be, it seems to us that the facts in the case at bar meet any prerequisite which this Court intended to lay down.

In the case at bar waiver is shown by the Commissioner's acceptance of the petitioner's invitation to send his auditors to examine its books and records pertaining to the floor stocks tax claim and by his conducting hearings on the merits of the claim after the investigation was completed without requesting further data in any other form. That his attention was "focused on the merits" of the claim and that he was "preoccupied" with the particular claim and controversy is shown by the Government's written admission filed in the District Court (R. 147 and 148) and by the memorandum which the Commissioner's representative submitted to the petitioner at the conclusion of the hearings (R. 157).

Thus, petitioner sustained its "burden of showing that the Commissioner by examining the facts of petitioner's claim in order to determine the merits dispensed with the exactions of the regulations."

In the *Angelus Milling Co.* case the Court found from the facts in evidence that the Commissioner's attention and investigation was not directed to the particular claim of Angelus Milling Co., but to the separate claim of Niagara Milling Co., and that the facts, if any, in relation to the former claim, therefore came to him only in a roundabout fashion. Furthermore, in the *Angelus* case the claim of waiver was predicated solely upon the investigation and not on any further action thereafter taken by the Commissioner indicative of his intention to consider the claim on the merits.

We, therefore, respectfully submit that the Circuit Court of Appeals was in error in concluding that the District Court was without jurisdiction.

II.

The Circuit Court of Appeals in Reaching its Decision on the Merits of This Case Disregarded the Ruling of the Supreme Court in *Webre Steib Co. v. Commissioner*, 65 S. Ct. 578.

The basic error in the trial court's conclusion and in the initial opinion of the Court of Appeals is that no cognizance was taken by either court of what occurred to market prices *after* the imposition date of the tax. As we have shown, the increase in market prices was not maintained throughout the period during which the inventory items were liquidated but, on the contrary, was for the most part promptly lost. One would never learn this from an inspection of the findings of the District Court, nor from an inspection of the initial opinion of the Court of Appeals. The fact is that the respondent persuaded both courts that this circumstance, although factually true, was without legal significance.

The decision of this Court in *Webre Steib v. Commissioner*, 65 S. Ct. 578, had not been rendered prior to the entry of the judgment in the District Court. At page 583 of its opinion in that case this Court said:

“* * * There is no evidence to show how far petitioner succeeded in its effort to pass the tax on except for the evidence that there was a general rise in the market on a date some months before petitioner's processing began. The margins are some evidence that the price may not have responded continuously to the efforts to shift the tax.”

Reference to the more detailed statement of facts in the same case in the Court of Appeals, 140 Fed. (2d) 768, will disclose, at page 771, that the increase in market prices “became effective as of the moment the processing tax was

imposed to cover the amount of the tax." Because in the *Webre Steib* case there was conflicting evidence as to "whether the price responded continuously", the case was remanded so that the evidence might be weighed and a finding be made.

In the case at bar, as we have shown, there is no conflict in the evidence. The undisputed evidence is that shortly after the rise there was a precipitous fall which was due to the refusal of the public to absorb the tax. It is clear from the opinion of this Court in that case that what happened to the prices after November 6, 1933, is not immaterial but is controlling.

As was said by the District Court in *Arkwright Mills v. United States*, 49 Fed. Supp. 970:

"Defendant's next argument is that under the formula quoted from the brief in the *Anniston* case, we should look to quoted prices on August 1, which were approximately the July 31 prices plus the tax, and say that on August 1 plaintiff raised its prices by the amount of the tax, thereby shifting the burden of the tax, and that no subsequent reduction in price could be attributed to the tax, but all must be attributed to the competitive market. This is fallacious in that it ignores realities. Whether a tax burden is absorbed or shifted must be judged by what happened, not by what was hoped for. If the market refused to take goods at pre-tax prices plus tax, and prices had to come down to pre-tax prices plus part of the tax, then the burden of only that part was shifted to the purchasers. They cannot be said to have borne the burden of anything they refused to pay for."

Nevertheless, in its initial opinion the Court of Appeals makes no mention of the *Webre Steib* case, nor of the decision of the United States District Court in *Arkwright Mills v. United States*, 49 Fed. Supp. 970, nor of the decision of the Court of Appeals for the Fourth Circuit

affirming it in 139 Fed. (2d) 454, which are in point on the merits of the instant case. Nor does it point to any evidence that the initial rise was maintained for any time past November 6, 1933. No comment is made on the uncontradicted evidence which shows that the price was not maintained.

Rather, the Court of Appeals erroneously took the view that the petitioner was questioning the fact finding of the trial court that on the day of the incidence of the tax the prices rose by the amount thereof. Having alluded to some of the evidence which supported the finding to that effect, the court concluded that there was substantial evidence to sustain the finding and that it could not be disturbed, and thus affirmed the judgment without ever getting to the merits of the case.

The supplemental opinion of the Circuit Court of Appeals rendered after the petition for rehearing was filed attempts to cure the error of the trial court in failing to make a finding as to what happened after the initial rise in prices on November 6, 1933, and to avoid a conflict with the *Webre Steib* case by saying that although the court made no finding as to what followed the initial rise in prices, it is reasonable to assume that it considered such evidence and remained convinced that the petitioner had shifted the burden of the tax.

But the provision of the Rules of Federal Procedure that the trial court shall make findings of fact must mean the specific findings on which the court's legal conclusions rest.

Furthermore, even if it is permissible to assume that the trial court considered the evidence of what occurred in the market after November 6, 1933, it could not have weighed that evidence and resolved its findings against the petitioner as the Circuit Court of Appeals assumed it did and reached the conclusion that the burden of the entire tax had been shifted. The fact that the rise in value of the inventory

on November 6, in the full amount of the tax, was precipitously lost and that that rapid fall in prices could not be attributed to a usual, gradual seasonal decline in the value of the inventory items was established by uncontroverted evidence. The necessary legal conclusion from that evidence is that the subsequent decline was due to the refusal of the public to absorb the entire tax.

III.

If the District Court Meant by Its Conclusion of Law No. 2 That it Could Not be Determined From All of the Evidence Whether Petitioner Had or Had Not Borne the Burden of the Tax, Then Its Denial of Recovery is Contrary to the Holding of This Court in *Anniston Mfg. Co. v. Davis*, 57 S. Ct., 816.

Petitioner discharged its burden of producing proof of its operations and course of business and all facts in its possession bearing upon the questions at issue. It likewise made available to the Government all data which it desired and most complete examinations and audits were made by the Government. If by conclusion of law No. 2 the trial court means that on all of the facts before it was impossible to determine whether the burden of the tax had or had not been shifted, then, under the authority of *Anniston Mfg. Co. v. Davis*, 57 S. Ct. 813, it should have given judgment for the petitioner.

We respectfully submit that certiorari should be granted to the end that this Honorable Court may settle the questions involved.

Respectfully submitted,

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